CompTel/ASCENT ALLIANCE

January 7, 2004

Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

**RE:** **AUSTRIA, AUSTRALIA, CHINA, FRANCE, GERMANY, INDIA, JAPAN, MEXICO, PERU, SINGAPORE, SOUTH AFRICA, AND SWITZERLAND:** *WTO General Agreement on Trade in Services*

**JAPAN:** *May 1998 U.S.-Japan Deregulation Joint Statement*

**SINGAPORE:** *U.S.-Singapore Free Trade Agreement*

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), the CompTel/ASCENT Alliance hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with certain telecommunications trade agreements. The CompTel/ASCENT Alliance was formed in November 2003 by the merger of the two leading trade associations in the competitive telecommunications industry, the Competitive Telecommunications Association ("CompTel"), founded in 1981, and the Association of Communications Enterprises ("ASCENT") (combined as "CompTel/ASCENT Alliance"). With 400 Members, the CompTel/ASCENT Alliance is the largest and oldest association in the U.S. representing competitive facilities-based carriers, providers using unbundled network elements, global integrated communications companies, and their supplier partners. The Alliance, which is based in Washington, D.C., includes companies of all sizes and profiles that provide voice, data and video services in the U.S. and around the world. CompTel/ASCENT Members share a common objective: to create and sustain true competition in the telecommunications industry, both domestically and internationally. With the development of liberalized regulatory regimes and competitive market conditions in a growing number of countries, many of CompTel/ASCENT Alliance Members have made significant investments in telecommunications facilities and services outside the United States. CompTel/ASCENT appreciates the opportunity to present its

Members' experiences in Austria, Australia, China, France, Germany, India, Japan, Mexico, Peru, Singapore, South Africa, and Switzerland.

In its 2003 Comments, CompTel/ASCENT noted in particular two important trade concerns that arise in most of the countries discussed in those Comments: (1) excessive and anti-competitive fixed-to-mobile termination rates; and (2) pricing and provisioning of local access leased lines. CompTel/ASCENT was encouraged by USTR's statement in its 2003 Section 1377 Report that it would consider taking further steps "where there is evidence of persistently excessive rates and national authorities are unable or unwilling to address the issue." Unfortunately, despite USTR's concerns, little progress has been made in many countries that CompTel/ASCENT cited in its 2003 submission. USTR should now consider taking such further steps to address mobile termination rates.

Because these issues continue to be of concern in so many of the countries discussed in these Comments, CompTel/ASCENT again includes a general overview of these issues. As CompTel/ASCENT highlighted in its 2003 Comments, in many cases the incumbent fixed network operators and mobile network operators also have been taking advantage of their significant market power in the provision of local access leased lines and mobile services to engage in anticompetitive price squeeze practices.[1] We also note, however, that there are a number of other countries and regions not specifically discussed in these Comments in which many of the same concerns exist, including but not limited to Belgium, the Caribbean, Central America, Dominican Republic, Ecuador, Ireland, Italy, the Netherlands, Norway, Sweden, Spain and Uruguay. CompTel/ASCENT's Members will keep a close watch on developments in these countries in the coming year.

## EXCESSIVE FIXED-TO-MOBILE TERMINATION RATES

As CompTel/ASCENT outlined in its 2003 Comments, fixed-to-mobile termination refers to the rates charged by mobile operators to fixed network operators to terminate voice traffic. Due to poor policy and a lack of regulation, mobile operators have abused their dominant position to turn mobile termination into a "cash cow." Specifically, regulators have failed to ensure that fixed-to-mobile termination rates are "cost-oriented," transparent and reasonable, as required by Section 2.2(b) of the *Reference Paper*, and have failed to ensure that U.S. service suppliers are "accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions," as required by Section 5(a) of the GATS *Annex on Telecommunications*.

[1] "Price squeeze" is a practice whereby incumbent operators use their market power over key inputs to discriminate in favor of their own operations. They offer better terms and conditions to their own competitive downstream operations, thus undermining new entrants' ability to compete. Incumbent retail offers continue to be significantly lower than wholesale offers and/or contain more attractive terms and conditions, including delivery time and guaranteed repair times. Competitive providers are unable to compete because of high wholesale rates.

| | Average Two Largest Operators | % Above Best Practice | % Above LRIC |
|---|---|---|---|
| Sweden ** | 9.06 | 0% | 127% |
| Norway ** | 9.89 | 9% | 147% |
| Austria | 12.30 | 36% | 208% |
| Ireland | 12.56 | 39% | 214% |
| Finland | 12.78 | 41% | 220% |
| France | 12.87 | 42% | 222% |
| UK | 14.17 | 56% | 254% |
| Germany | 14.32 | 58% | 258% |
| Belgium | 14.67 | 62% | 267% |
| Denmark | 15.27 | 69% | 282% |
| Italy | 15.41 | 70% | 285% |
| Netherlands | 15.50 | 71% | 288% |
| Spain * | 16.16 | 78% | 304% |
| Switzerland | 24.09 | 166% | 502% |
| Average | 14.22 | 57% | 255% |

* Includes effect of 1st indivisible block (60 sec in Spain)

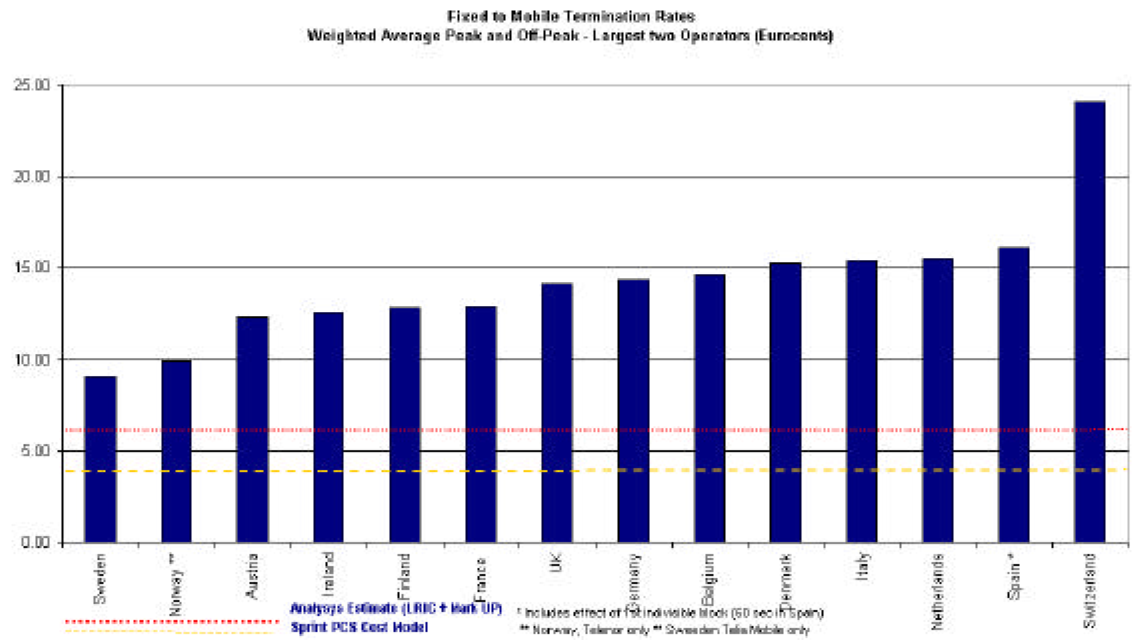
** Norway, Telenor only

** Sweden Telia Mobile only

(Fixed-to-mobile interconnection in Eurocents)

Mobile operators across Europe have used the abusive and excessive margins they earn on fixed-to-mobile termination to cross-subsidize other activities and to discriminate against fixed network operators. These practices have resulted in significant harm to the business of competitive fixed line operators. Many of the fixed network operators most heavily penalized by this system are U.S. operators or European operators with substantial U.S. investment. As indicated by the above chart, the European countries listed in these Comments (Germany, France and Switzerland) all suffer from high domestic fixed-to-mobile termination rates. High mobile termination rates also are a problem throughout Latin America and in Japan.

Also among the losers are the fixed network operators, who currently are facing severe financial challenges in a difficult market. The fixed network operators not only bear the high termination cost but also are forced to sell to their own customers at a loss as they compete directly with mobile network operators and vertically integrated fixed-mobile operators who sell fixed-to-mobile calls at prices that are below the cost of termination. The chart below demonstrates how excessive the mobile interconnection rates of the two largest mobile operators are in selected countries when compared with cost models and best practice rates. Smaller mobile operators tend to impose even higher interconnection charges.




(Left axis represents Eurocents)

CompTel/ASCENT estimates that in 2001 alone, mobile network operators reaped over **15.4 billion Euros** in excess charges in France, Germany, Sweden, the United Kingdom, Belgium, Italy, Netherlands and Spain.[2] Mobile network operators in Latin America also obtain large subsidies from U.S. carriers and consumers as a result of excess termination charges.

The fixed-to-mobile termination rate problem also adversely affects international traffic terminating in mobile networks. Mobile network operators abuse their respective dominant positions by imposing extremely high fixed-to-mobile termination rates for international traffic. The mobile termination rate problem, particularly in Europe and Latin America, affects consumers and operators in the United States and other regions as mobile surcharges proliferate - as high as 25 U.S. cents per minute on calls from the United States to Europe. U.S. consumers today pay two to three times more per minute for calls made to mobile phones in Europe and Latin America as compared to calls made to fixed line phones. The impact to U.S. consumers is very apparent. Indeed, in some cases, the termination rate for an overseas fixed-to-mobile call could be up to 1585% higher than the cost of terminating a call to a fixed telephone overseas as a result of excessive surcharges imposed for mobile termination traffic.

Last year, CompTel/ASCENT indicated that the excessive international fixed-to-mobile termination rates cost U.S. consumers more than $368 million a year, and that the subsidies transferred from the U.S. to carriers in Germany, France, the United Kingdom, and Japan ranges

[2] This calculation was derived by comparing the termination rates charged with publicly available (and highly conservative) cost estimates and multiplying by volume.

from $14-25 million a year for each route. Subsidies transferred to Latin American mobile operators also constitute millions of dollars per year. That consumer cost increased in 2003.

**Anticompetitive Impact:** Discrimination also is a significant problem. Mobile network operators effectively raise their fixed network operator rivals' costs, while unaffiliated mobile network operators take advantage of the price umbrella for fixed-to-mobile termination, and mobile network operators charge their customers far less for "on-net" mobile-to-mobile termination than they charge fixed network operators for fixed-to-mobile termination. Moreover, mobile network operators offer retail fixed-to-mobile prices to corporate Virtual Private Network ("VPN") customers at rates substantially lower than the fixed-to-mobile "interconnection" rate charged to fixed operators. In addition to the countries listed in these Comments, such discrimination continues to be a significant problem in other European countries, most notably in the Netherlands.

**Compliance:** In order to comply with their WTO obligations, CompTel/ASCENT submits that national regulatory authorities in their respective markets should implement effective regulatory controls, including cost-oriented pricing and price squeeze tests, over fixed-to-mobile termination. Such measures are required to adjust for market failures and anticompetitive practices imposed by the mobile operators. To establish cost-oriented fixed-to-mobile termination rates that comply with the relevant WTO commitments, a Long Run Incremental Cost ("LRIC") model should be developed and reductions imposed as a result of the LRIC model should be implemented immediately.

**PRICING AND PROVISIONING OF LOCAL ACCESS LEASED LINES**

Due to the lack of a competitive supply of local access alternatives across Europe, the Asia Pacific region and Latin America, the incumbents' local access lines remain the principal bottleneck facing emerging competitors. The successful delivery of global services to customers in the U.S., Asia, Europe, Latin America and the rest of the world will require competitively priced, carrier-grade broadband local access leased lines that are delivered on a timely basis, particularly in large markets like Germany and France.

U.S. emerging competitive carriers procure local access leased lines from incumbents to link their customers to their global networks. Local access leased lines are the major local access facilities utilized by competitive telecommunications providers in Europe and in every competitive market throughout the world. Although it is true that some countries are taking the right steps, in most countries rates continue to be well above cost-oriented rates, and provisioning of local access leased lines is not done in a timely manner. In Germany, for instance, the incumbent refuses to provide local access leased lines in a timely, non-discriminatory manner and to provide a viable leased line interconnection product, in violation of European Union ("EU") practice. Germany's telecommunications regulatory authority's ("RegTP") positive decision that would resolve this situation was blocked when Deutsche Telecom ("DTAG") appealed the decision in 2002. The appeal is still pending more than one year later. Similarly, incumbents in other regions have refused to offer cost-oriented and timely provisioning of local access leased lines.

The timely availability of local access leased lines is critical for the development of an effective competitive market for broadband services within the EU Member States, the Asia-Pacific region, Latin America, and elsewhere. Whereas local loop unbundling will enable residential customers and small and medium enterprises ("SMEs") to achieve cost-effective, high speed access to the Internet, leased lines and bit stream access are vital for government agencies and businesses of all sizes to conduct their internal communications, business-to-business applications and interconnection among operators and service providers. European Commission ("EC") law recognizes the importance of leased lines in both the Leased Line and Interconnection Directives and the 2001 Telecom Review.[3]

**Anticompetitive Impact:** Incumbents in many markets continue charging prices that are far above cost for leasing local access lines to their competitors. Increasingly, however, incumbents are engaging in both non-price and price abuses in the market for local access leased lines. Incumbents in many markets charge prices that are far above cost for leasing local access leased lines to their competitors.

Non-price abuses can be as powerful as pricing abuses but typically are more difficult to detect and to prove. They can be used for both discriminatory and exclusionary purposes. Moreover, they have the cumulative effect of undermining the value of U.S. telecommunications investment abroad. Non-price abuses may take different forms. Such abuse might be implemented in the form of discriminatory provisioning (*e.g.*, the incumbent provisions to its affiliates or retail customers more quickly than it provisions to wholesale customers that compete with the incumbent or its affiliates) or in the form of "rising rivals' costs" (*e.g.*, the incumbent provisions to its affiliates or retail customers in the same, slow time as it provisions to its wholesale customers, but the delays are felt more substantially by the wholesale customers who in turn are trying to win new customers, in part, by offering superior services).

**Compliance:** In order to comply with their World Trade Organization ("WTO") *General Agreement on Trade in Services* ("GATS") commitments and the Reference Paper ("*Reference Paper*") negotiated as part of the WTO *Basic Telecommunications Agreement*, CompTel/ASCENT submits that the relevant national regulatory agencies ("NRAs") should require incumbent carriers to promptly and fully comply with regulations on nondiscrimination and anticompetitive practices and adopt reporting and monitoring measures with respect to incumbents' provisioning of local access leased lines. Specifically, the NRAs should: (1) require incumbents to report data on leased line provisioning (*e.g.*, cost provisioning times, quality of service standards) in a uniform, transparent and auditable way to permit comparison of incumbents' provisioning of leased lines to their affiliates, retail customers and wholesale customers/competitors; (2) analyze such data on a regular basis to identify any anticompetitive

[3] European Commission, Recommendation on Leased Lines Interconnection Pricing in a Liberalised Telecommunications Market, C(1999)3863, 24 November 1999; European Commission, Recommendation Amending Commission Recommendation 98/511/EC of 29 July 1998 on Interconnection Pricing in a Liberalised Telecommunications Market, 20 March 2000; European Commission, Communications from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee on Regions, Seventh Report on the Implementation of the Telecommunications Regulatory Package, COM(2001) ("Seventh Implementation Report").

practices and develop a European "best practice" for leased lines; (3) determine appropriate standard delivery intervals based on European best practices; and (4) impose uncapped penalties to deter anticompetitive practices in provisioning.

**AUSTRALIA**

In its 2003 Section 1377 Comment, CompTel/ASCENT indicated that the incumbent fixed and mobile network operators in Australia are charging excessive rates for last mile access and fixed-to-mobile termination. Such practices remain in 2004, in violation of Australia's commitment to WTO principles.

**WTO Violations – *Reference Paper and GATS Telecommunications Annex***

**Local Access Leased Lines – Excessive Prices:** Despite the requirements of Section 2.2(b) of the Reference Paper for cost-oriented rates, Australian rates for local access leased lines remain excessive. In a 2002 report, the Australian Government's National Office for the Information Economy ("NOIE") set forth Organization of Economic Cooperation and Development ("OECD") data that shows Australia as ranking tenth of the eleven countries surveyed for "charges for a basket of national leased lines of 2 Mbs per second."[4] Those rates have barely changed since then. Telstra's leveraging of its control over local leased circuit facilities remains the most significant barrier to the development of competition for Australian business and Internet users. According to industry information, Telstra's charges for a 2 km, 2 Mbs structured local access circuit are twice EU best practice and twice those in the U.S. and Taiwan.

As CompTel/ASCENT noted last year, under the Australian Competition and Consumer Commission's ("ACCC") authority to declare[5] certain access services to be essential services, the ACCC has deemed certain local tail circuit services, including "Digital Data Access Service" ("DDAS"), to be essential. Despite the requirement that the rates for these tail circuits be cost-oriented, the ACCC does not publish the cost data provided by Telstra that is used to establish the indicative prices that the Commission has set for these services. The lack of transparency in the process makes it extremely difficult for Telstra's competitors to gather meaningful data to present to the Commission to arbitrate disputes involving predatory pricing and price squeezes. Such lack of transparency remains a problem in Australia.

**Excessive Fixed-to-Mobile Termination Rates:** Currently in Australia, fixed-to-mobile termination has been determined to be a "declared service" but is regulated under an ineffectual retail-minus methodology. This approach has resulted in excessive fixed-to-mobile termination rates in Australia, in violation of Sections 1 and 2.2 (b) of the *Reference Paper* and Section 5 of the GATS *Telecommunications Annex*. In particular, the Australian mobile operators' current

[4] NOIE, "Charges for a Basket of National Leased Lines of 2 megabits/second", at: http://www.noie.gov.au/projects/framework/progress.ie_stats/CSOP_April2002/CSOP_pages/basket_natio.

[5] Declaration ensures service providers have access to the inputs they need to supply competitive communications services to end-users and in accordance with the standard access obligations outlined in s.152AR of the *Trade Practices Act 1974.*

rates of A$0.22 – A$0.24 (US$0.169 – US$0.180) per minute for fixed-to-mobile termination is more than 13 times higher than the rate they charge for fixed-to-fixed interconnection. Moreover, the mobile operators' rate for fixed-to-mobile termination is three to four times above LRIC-based rates and more than 30% higher than the "best practice" rates in OECD countries. In 2003, the ACCC initiated a consultation proceeding to address excessive mobile termination rates, seeking comment from industry. The ACCC announced in December 2003 that a decision in the proceeding would be issued in early 2004. CompTel/ASCENT is hopeful that ACCC will implement cost-oriented mobile termination rates in compliance with Australia's WTO commitments, but we urge USTR to monitor closely the results of the ACCC consultation.

**AUSTRIA**

**WTO Violations – *Reference Paper***

**Interconnection:** The Austrian Government adopted a new telecommunications law in August 2003 ("Telecom Law"). The Telecom Law, however, did not address a serious problem with resolution of interconnection disputes in Austria. Specifically, while interconnection disputes are settled in a timely fashion in the first instance, appeal procedures are a significant problem. Since 1998, the Austrian Administrative Court has definitively completed only a few out of more than 120 interconnection disputes. This leads to substantial business risks for alternative operators. In October 2003, the Administrative Court accepted an appeal by the incumbent against the initial March 1998 first instance decision on interconnection rates for public telecommunications. This could result in huge retrospective compensation requests by the incumbent to alternative operators if the NRA does not issue a new decision within the next few months. CompTel/ASCENT therefore urges USTR to ensure that Austria lives up to its *Reference Paper* commitment to establish a timely interconnection dispute resolution mechanism.

Moreover, CompTel/ASCENT is concerned that Austria may be in violation of its *Reference Paper* commitment to ensure cost-oriented interconnection to the major supplier's public telecommunications transport networks and services. The interconnection rates to the major supplier in Austria are among the highest in Europe -- nearly two times higher than the EU best practice -- for all connectivity types (local, single tandem and double tandem). This is mainly a result of the method applied by the NRA and insufficient scrutiny of the incumbent's cost data.

**CHINA**

**WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex***

China has entered year three of its WTO membership, one-third of the way through a six-year schedule for opening up its telecom services market to direct foreign participation. To date, there has been little actual foreign investment in spite of the fact that the size and rapid growth of China's telecom market presents an extremely attractive opportunity. China has taken a number of positive steps to implement its WTO telecommunications services commitments, including abolishing some outdated regulations, and has begun the development of a body of new regulations, including those governing foreign investment and participation in telecom services. However, its reform efforts in many key areas have been slow and inconsistent. If China is to achieve global integration and to help encourage foreign investment and trade, CompTel/ASCENT highlights two significant areas that must improve: the continued lack of transparency in the regulatory process and an excessive capitalization requirement for a basic telecommunications license.

**Lack of Transparency and Independent Regulator:** China's WTO Schedule of Commitments included adoption of the GATS *Reference Paper*, which binds it to establish an independent, impartial regulatory authority and a pro-competitive regulatory regime. Although China has adopted or revised many laws to comply with other WTO commitments, a long-awaited draft telecom law remains pending. The pending Telecom Law is needed to establish and enforce rules supporting emerging operators, to ensure transparent processes for the formulation of new regulations (in consultation with affected companies and interested parties), and to establish an independent and impartial regulator. The current regulator, the Ministry of Information Industry ("MII"), cannot be considered "independent" because one of its primary functions continues to be an operational oversight supportive of the state enterprises. As a result, MII has continued a troubling pattern of issuing rules distinctly favorable to state owned enterprises in a very non-transparent manner, without inviting public discussion or comments from industry.

**High Registered-Capital Requirement for Basic Service Operators:** Shortly after China's accession to the WTO was approved in 2001, China adopted The Regulation on Foreign-Invested Telecom Enterprises (State Council Order 333), including a stipulation that Foreign Invested Telecom Enterprises (FITEs) engaging in "basic telecom services" shall have a minimum registered capital of RMB 2 billion (~USD 240 million). This significant barrier to entry "could not reasonably have been expected" when China's commitments were made, as required by Article VI 5 (a)(ii) of the GATS. The unjustified amount of this capital requirement bears no relationship to reasonable commercial or public interest requirements to ensure the qualifications of a license applicant. The registered capital requirement should be eliminated or drastically reduced.

**Local Access Lines - Competitive Safeguards:** The restructuring of the domestic telecom industry in China in mid-2003 created two dominant carriers of domestic fixed line infrastructures in their respective regions of operation (China Netcom in Northern China and China Telecom in the rest of China). Each provider is a major supplier in its respective region for the provision of leased line services. The Chinese Government, however, has failed to implement measures to ensure a leased line provisioning and pricing regime with clearly defined and measurable service targets among all operators, to prevent anti-competitive practices in provisioning customer access lines via bottleneck facilities. USTR should urge the Chinese Government to adopt such rules consistent with China's Reference Paper commitments.

**FRANCE**

**WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex***

In France, new entrants continue to face multiple barriers that are in clear violation of the WTO *Reference Paper* and GATS *Telecommunications Annex*.

**Lack of Independence of the NRA:** This situation has not changed since CompTel/ASCENT's 2003 Comments. Section 5 of the *Reference Paper* requires that the regulatory body be separate from, and not accountable to, any supplier of basic telecommunications services. However, the independent regulator established by the French Government to oversee telecommunications policy, L'Autorite de Regulations des Telecommunications ("ART"), effectively shares oversight with the Finance Ministry, which also is the majority owner of the major supplier, France Telecom ("FT"). This arrangement results in confusion and a lack of transparency, in violation of Section 5 of the *Reference Paper*. Indeed, lack of a truly independent regulator has been highlighted by the OECD in its "Draft Report on Regulatory Reform in Telecommunications – France" as a key weakness in the French regulatory regime. Of particular concern is a decision by the Finance Ministry to ignore the ART's recommendation to investigate price squeeze concerns regarding a France Telecom tariff related to broadband Internet access. Despite the ART's concern, the Ministry approved the tariff.

**Local Access Leased Lines – Discriminatory Pricing:** In France, consistent with EC policy, local access leased lines are included in FT's Reference Interconnection Offer ("RIO"). RIOs are EU terminology used to describe the list of regulated interconnection services that incumbents are required to provide to new entrants pursuant to national and EU laws and regulations. Thus, leased lines are considered interconnection services. ART issued a decision in February 2002 on a number of leased line issues in dispute. This decision was designed to require the incumbent to introduce interconnection leased lines into its RIO, and to modify the conditions for delivery, including applicable penalty clauses in order to end the discriminatory treatment of FT's competitors. While successive ART decisions in the RIO for 2003-2004 have improved the baseline offer for interconnection in France, due to onerous migration conditions and price squeeze effects there still is no viable local access interconnection offer in France.

Unfortunately, FT has blocked the implementation of the ART's decision by refusing to implement LRIC pricing, providing critical data months late, imposing unreasonable penalties in its interconnection offer, and setting up a price squeeze situation vis-a-vis cheaper retail digital subscriber line ("DSL") access lines. Additionally, FT continues to stonewall on provision of an interconnection DSL bit stream offer, although an excellent retail offer (both in terms of price and quality of service) is available, in both asymmetric digital subscriber line ("ADSL") and soon symmetric digital subscriber line ("SDSL") variants.

The EU's 8th Implementation Report corroborates the claims of new entrants and in particular states that "tariffs for most retail leased lines have remained unchanged from last year with the result that France remains above the EU average for most types and lengths of leased line, with the exception of short distance high capacity lines (140/155 Mbits/s)."[6]

**Local Access Leased Lines – Provisioning Delays:** FT unilaterally has degraded the quality of service commitments contained in its local access leased line contracts with new entrants, and substantially stiffened the terms of such contracts. Such actions are highly detrimental to the businesses of emerging carriers. In particular, CompTel/ASCENT is concerned about the preferred treatment that FT is giving to its retail arm in the "premium" service that FT offers to its own clients covering repair times and guarantees on downtime, and which is not available for other operators. Such discrimination, lack of transparency and unreasonable delays in provisioning clearly violate Sections 2.2(a) and (b) of the *Reference Paper*.

In addition to the *Reference Paper*, Section 5(a) of the GATS *Telecommunications Annex* requires France to ensure that service suppliers of other WTO members have access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for their provisioning of value-added services. In the 2003 Section 1377 Report, USTR stated that it would monitor the timeliness of provisioning and adherence to non-discriminatory terms in France. Given the lack of significant change in France, further steps by UTSR may be necessary to address these concerns.

**Excessive Fixed-to-Mobile Termination Rates:** Regulation of the mobile sector in France continues to be insufficient, in clear violation of Sections 1.1 and 2.2(b) of the *Reference Paper* and Section 5(a) of the GATS *Telecommunications Annex*. The French regulator, ART, has taken some important measures, but the mobile operators still are engaging in anti-competitive practices. ART designated both Orange (France Telecom) and SFR (Cegetel) as having Significant Market Power ("SMP") in the national interconnection market, with a legal obligation to provide cost-oriented carrier grade interconnection (fixed-to-mobile termination) to fixed operators. In addition, ART mandated a 20% reduction in fixed-to-mobile rates in 2001, and a 40% reduction over four years starting in March 2002. The ART has also indicated that a new three-year price cap on fixed-to-mobile termination rates will be put in place in the first quarter of 2004.

Despite these ART-mandated reductions on fixed-to-mobile termination rates, France remains an unhealthy marketplace for U.S. carriers due to price squeeze strategies executed by the vertically integrated SMP operators Orange (France Telecom) and SFR (Cegetel), and the discriminatory termination charges levied by all mobile operators in favor of calls from other mobile networks. Such discrimination in the terms and conditions for access to and use of the public mobile telecommunications network in France violates the GATS *Annex on Telecommunications*.

The French competition authority is investigating the price squeeze problem, but the outcome of the investigation is uncertain. It remains imperative, therefore, for the French

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[6] 8th Implementation Report, Annex 3, Country Report, France, p. 76.

Government to take immediate action to resolve this problem. The development of a price squeeze test with a comprehensive monitoring process should be implemented without delay.

In addition, U.S. telecommunications operators paid approximately US$14.7 million in above-cost subsidies to French mobile operators during 2001 for U.S.-originated traffic terminating on French mobile phones. That figure increased in 2002 and 2003. As U.S.-originated traffic terminating on mobile phones continues to grow as a result of higher penetration rates, CompTel/ASCENT anticipates that this problem will only expand unless the French Government takes appropriate action.

**State Aid:** Finally, the French Government's decision to make available a 9 Billion Euros loan facility to FT may violate the national treatment obligation under the GATS. An EU investigation is currently under way, and should be monitored closely by USTR.

**France Telecom's Broadband Monopoly:** FT, by end of 2003, had three million active DSL lines and approximately 79 percent of the population had access to the high-speed service. FT recently announced that it plans to invest more than 700 million Euros over 2003 and 2005 in its DSL services. Unless competitors obtain fair and timely loop access and access to leased lines, there will be no competition in this market.

**GERMANY**

Unfortunately for competitors and consumers, the negative situation in Germany described in CompTel/ASCENT's 2003 Comments and in USTR's 2003 Section 1377 Report has deteriorated, largely as a result of the proposed Amendment to the German Telecommunications Act ("Draft Law") currently being considered in Germany. As emphasized in Comments of earlier years, the intermingling of interests between the German Federal Government, its telecommunications regulator ("RegTP"), and Deutsche Telekom ("DTAG") remains a serious problem.

In its 2003 Comments, CompTel/ASCENT highlighted the most critical telecommunications policy issues in Germany: (1) leased line provisioning, (2) fixed-to-mobile termination rates, (3) DTAG's broadband monopoly, and (4) lack of an independent regulator. Not only has the German Government not adequately addressed these problems, but also the new Draft Telecommunications Act threatens to *worsen* them. USTR has reviewed these very same issues over several years, specifically noting in its 2003 Section 1377 Report that it was "disappointed" that Germany had not ensured non-discriminatory access to leased lines, and indicating that USTR would follow implementation of the Draft Telecommunications Act with interest. CompTel/ASCENT believes it is time for USTR to take more decisive action to address the widespread failure of the German Government to live up to its commitments under the WTO Agreement.

**Draft German Telecommunications Law:** The current draft of the proposed Amendment to the German Telecommunications Act that is being considered by the German legislature contains several troubling provisions. As set forth in the specific discussions below, the Draft Law threatens to further undermine the existence of an independent regulator and threatens to set in stone Germany's refusal to address excessive, discriminatory and anti-competitive mobile termination rates. Most troubling, the Draft Law appears to eliminate the possibility for *ex ante* regulation even where significant market power exists.

Moreover, according to the *Reference Paper*, the national law that competitors are facing must be clear and transparent, in particular in the areas of interconnection and use of public telecommunications transport networks and services (Sections 2.3 and 2.4 of the *Reference Paper* and Section 4 of the *Telecommunications Annex*). Competitors in Germany, however, find themselves in limbo. They are concerned about the delays in Germany for revising the Telecommunications Act as well as about the contents of the Draft Law. After the passing of the deadline for implementation of the EU's new regulatory framework for electronic communications into national law last July, the European Commission in early October opened infringement proceedings against Germany and seven other Member States for failure to comply with the EU law. The Commission is now following up on this action by sending warning letters ("Reasoned Opinions") to Germany and a number of additional Member States that have still not implemented the regulatory framework into their national legislation. It is likely that Germany will not adopt the necessary legal measures before summer 2004. In the meantime, RegTP has not even started a review process of the markets that should be regulated, with the result that the new law will probably not take effect before the end of 2004/beginning of 2005; (RegTP has simply sent out "preliminary" market review questionnaires, but in fact has not formally begun the market review process). It will only then become clear what the law of the land is and which markets regulatory authority will cover.

**WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex***

**Lack of Independent Regulator:** CompTel/ASCENT has noticed increased political pressure on RegTP in 2003. This development is hardly coincidental, given that the German Government still holds a direct and indirect ownership interest of 43% in the incumbent DTAG. Worse still, the political influence over RegTP is likely to be strengthened in the Draft Law. According to the Draft Law (Section 130 Para. 4), the Economics Ministry will be given the power to provide that all guiding regulatory decisions – such as the decisions on market definitions, market analysis and remedies – shall be made by the "Presidential Chamber" of RegTP, which is in essence the board of this authority, the members of which are comprised of representatives appointed by political criteria and not due to expert knowledge. CompTel/ASCENT is concerned that RegTP's board, which is therefore particularly vulnerable to political influence, will make crucial decisions in favor or against regulation of markets and effective remedies. It has to be ensured that future decisions will not be guided by political influence and solely be based on technical and competitive expertise.

Moreover, the current Draft Law introduces an additional "functional competition" test that would need to be met before sector specific regulation could be applied. In other words, if "functional competition" is found to exist in a defined market, that market could not legally be subject to *ex ante* regulation. The introduction of this new concept of "functional competition" in the Draft Law creates the potential for elimination of *ex ante* rate regulation of operators, even in the absence of effective competition, or could prevent the application of *ex post* "sector–specific" regulation. This removes the critical role of an independent regulator, which is to determine when regulation is necessary, based on objective and expert analysis by the regulator.

**Local Access Leased Lines – Provisioning Delays:** As CompTel/ASCENT noted in its 2003 Comments, DTAG continues to treat its competitors less favorably than its affiliates and itself in the provisioning of local access leased lines. The local access bottleneck must be available to competitors on nondiscriminatory, reasonable terms. New entrants rely on DTAG's local access leased lines to connect business customers of all sizes to their networks.

The delivery times for local access (leased lines) in Germany have for a long time been among the highest in Europe. Moreover, competitive operators have been seeing an increased number of leased line outages during working hours, likely due to DTAG's conducting maintenance work outside of the agreed times for leased line maintenance. As CompTel/ASCENT explained last year, RegTP's May 2002 decision addressing DTAG leased line provisioning was successfully appealed by DTAG. The decision remains in legal limbo, pending a decision by the Cologne Administrative Court. The Court is likely to wait for the Draft Telecommunications Law to come into force before issuing a decision. In sum, until a final decision by the Court on the RegTP decision, DTAG is not obliged to implement the RegTP decision, despite the fact that DTAG's leased line provisioning intervals are still discriminatory. The German Government's failure to resolve this issue places it in violation of several *Reference Paper* provisions and the GATS *Telecommunications Annex*. Section 2.2 of the *Reference Paper* requires Germany to ensure, among other things, that interconnection is provided with a major supplier in a timely fashion and under terms and conditions that are nondiscriminatory.

In addition, Section 1.1 of the *Reference Paper* requires Germany to maintain measures that prevent a major supplier from engaging in or continuing anticompetitive practices. In Germany, however, the Government (despite the RegTP's efforts) has thus far failed to ensure the prevention of anticompetitive practices by its major supplier, DTAG, in the provisioning of local access leased lines. DTAG has been formally designated to be the dominant operator in the German leased line market, and has the regulatory obligation to provide non-discriminatory provisioning of leased lines to other operators.

Finally, Section 5(a) of the GATS *Telecommunications Annex* requires Germany to ensure that service suppliers of other WTO members have access to and use of public telecommunications transport networks and services on reasonable and nondiscriminatory terms and conditions for their provision of value-added services. Germany, however, has failed to prevent DTAG from provisioning local access leased lines, a fundamental part of the public telecommunications transport network, to providers of value-added services in Germany on an unreasonable and discriminatory basis.

**Excessive and Discriminatory Fixed-to-Mobile Termination Rates:** One year later, CompTel/ASCENT is disappointed to report that Germany still fails to ensure that fixed-to-mobile termination rates are nondiscriminatory, cost-oriented, transparent and reasonable, as required by Section 2.2 of the *Reference Paper,* and has failed to ensure access to and use of the public mobile telecommunications network on reasonable and non-discriminatory terms and conditions, as required by Section 5(a) of the GATS *Telecommunications Annex*. In Germany, there is no competition for termination tariffs: mobile network operators are not subject to competition, as each mobile network operator is market dominant in its own network. Despite this dominance, RegTP has designated neither DTAG's D1 nor Vodafone's D2 as having Significant Market Power ("SMP") with a legal obligation to provide cost-oriented, carrier grade interconnection (fixed-to-mobile termination) to fixed operators. In France, by contrast, the major mobile providers have been declared SMP operators.

The data shows that German fixed-to-mobile rates are indeed excessive. German fixed-to-mobile rates are between 258% above LRIC cost model estimates, and approximately 58% above European best practice.

The consequences are both a weakening demand and lower investments in broadband infrastructure. Fixed network operators and retail customers also are harmed. The winners are the major suppliers, especially vertically integrated mobile network operators, who abuse their market dominant position to compete with fixed network operators by means of price dumping. The business situation facing fixed network operators with respect to fixed-to-mobile termination has deteriorated dramatically over 2003. The retail price for fixed-to-mobile calls offered by vertically integrated fixed/mobile operators in the German market are close to or in some cases below the "wholesale" interconnection rate. For example, DTAG/D1 now offer retail fixed-to-mobile minutes in the context of bundled offers to corporate closed user groups or large customers at rates below the interconnection rate. These practices distort the market in favor of mobile operators. Fixed operators, including some CompTel/ASCENT Members, are required either to lose those customers or sell at a loss.

RegTP so far has consistently refused to regulate mobile network operators, despite opinions voiced to the contrary by the Monopoly Commission, the Federal Cartel Office, carriers' groups, and the European Commission. RegTP's position is unlikely to change. Indeed, the German Government is explicitly attempting to prevent regulation of mobile termination indefinitely via amendments to the Telecom Act. Specifically, the Draft Law (Section 28 para 4) states that regulatory approval of rates is only required when an operator possesses significant market power in both the wholesale "access" and the retail "end-user" sides of a defined market (the so-called "double dominance" test). This provision would preclude *ex ante* rate regulation in situations where an operator possesses significant market power in a wholesale market (such as the mobile termination market) but where the retail market is found to be competitive. The explanatory notes on this provision explicitly state that the double dominance test has the objective of justifying exclusion of mobile operators from *ex ante* rate regulation. The "functional competition" test in the Draft Law explained above also appears to have the goal of preventing regulation of mobile operators in Germany.

**Fixed-to-Mobile Price Squeeze: Mobile Virtual Private Network ("MVPN"):** MVPN offerings are special retail tariffs, which are being offered by mobile network operators, or, as the case may be, by vertically integrated fixed/mobile network operators. In Germany, MVPNs are widespread: they are being widely deployed by vertically integrated and non-vertically integrated mobile network operators, *e.g.*, T-Mobile, Vodafone, or E Plus.

CompTel/ASCENT emphasized in its 2003 Section 1377 Comment that there is a price squeeze issue with MVPNs: the signficant difference between cost and termination rate charges enables mobile network operators to charge low MVPN prices to retail business users. MVPN Mobile-to-Mobile ("MTM") on-net rates are even considerably lower than fixed-to-mobile wholesale rates. The price squeeze issue in Germany has worsened in 2003, as Vodafone and T-Mobile have *lowered* their retail MVPN rates while at the same time increasing their wholesale mobile termination rates, exacerbating the price squeeze against fixed operators.

CompTel/ASCENT believes that there is evidence that for purposes of MVPN arrangements, Germany has violated Section 1 of the *Reference Paper*, which requires the maintenance of appropriate measures "for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging or continuing anticompetitive practices." Under Section 1.2, "engaging in anticompetitive cross-subsidization" is specifically included as an anticompetitive practice.

**DTAG's New Broadband Monopoly:** As CompTel/ASCENT stated in its Comments in USTR's 2003 Section 1377 Review, the German Government is in breach of Sections 1.1 and 2.2 of the *Reference Paper*, since DTAG essentially controls the terms on which its competitors may obtain broadband DSL access. Most important, there is no access or rate regulation with regard to DSL "bit stream" access in Germany in place. Bit stream access is defined by the European Commission as "the situation where the incumbent installs a high-speed access link to the customer premises (*e.g.*, by installing its preferred ADSL equipment and configuration in its local access network) and then makes this access link available to third parties, to enable them to provide high speed services to customers. The incumbent may also provide transmission services to its competitors, to carry traffic to a 'higher' level in the network hierarchy where new entrants may already have a point of presence (*e.g.*, transit switch location)."

DTAG currently does not offer bit stream access to its competitors on a wholesale basis. The current Draft Telecommunications Act is not sufficiently clear on competitors' rights to demand bit stream access from the incumbent. Therefore, it is necessary to include explicitly access regulation with regard to bit stream access in the Draft Law because DTAG has significant market power (SMP) in the DSL retail market with a 94 percent market share. Without a sufficient wholesale product like bit stream access, there is a lack of competition on the retail broadband market with no hope of future improvement.

RegTP recently sent questionnaires to operators and end customers asking for comment on the broadband wholesale market. This is not the official questionnaire according to the EU Framework Directive on the market definition and analysis. USTR should therefore urge the German Government to ensure that competitors have access to a bit stream access wholesale product on reasonable and non-discriminatory terms and conditions that are clearly provided for in Draft Law.

**Appellate Proceedings:** Competitors continue to have concerns about the lack of transparency in current German appeals court processes and their length, a problem that is compounded by the use in the telecommunications sector of the German Administrative Courts rather than the Cartel Courts. The effect of any appeal of a RegTP decision to the Administrative Courts in Germany is to immediately eliminate any transparency from the action. All major decisions taken by RegTP become mired in the appeal process (in many cases for years), delaying application of German Telecommunications law and thus allowing DTAG to continue to pre-empt competition in the German marketplace. It is, therefore, crucial that competitors be afforded an opportunity to participate in any proceeding that will have a direct and substantial impact on their business plans. In many cases, with at least two courts involved even in a preliminary injunction proceeding, the final court decisions often come too late to make a difference. Transfer of jurisdiction for telecommunications appeals from the Administrative Courts to the Cartel Courts would significantly improve transparency and technical expertise in the appellate process, as third parties are permitted to participate in Cartel Court hearings while not in Administrative Court hearings. The Draft Law, however, explicitly preserves the jurisdiction of the Administrative Courts over appeals of telecommunications decisions, threatening to continue the non-transparent and lengthy appellate process.

**Content Liability:** There are several political and legal initiatives in Germany that make ISPs, including those ISPs that only provide access to the Internet ("IAPs"), liable for content that is accessible via the Internet. The main concerns regarding these initiatives relate to harmful and illegal content. However, these initiatives also cover other issues, such as copyright infringement.

Local supervising authorities as well as politicians are seeking ways to ensure that German law is applied throughout the German Internet community. The method chosen for applying German law is to obligate hosting providers and IAPs (if the hosting provider is located outside of Germany) to block access to illegal and harmful content, sometimes as identified by local authorities. CompTel/ASCENT encourages the prosecution of the content providers of illegal content, but blocking access to websites hosting illegal and harmful content is a technically inappropriate and inefficient measure. In addition, the growth of the Internet would be inhibited due to: (1) technical inability to comply; (2) the economic inability of many smaller providers to shoulder an attempt at compliance; and (3) the chilling effect on content caused in other jurisdictions due to the extra-territorial reach of the relevant German law.

In principle, German law allows IAPs to be made liable if:

- IAPs are made aware of illegal content on their websites (*e.g.*, through the reception of a formal letter by supervising authorities); and,
- Blocking content or access to content is technically possible and reasonable for the IAPs.

The problem is this permits blocking not only illegal content, but also harmful or merely unwanted content. By blocking the URL, everything is censored. IAPs would be obliged to block access to URLs even though they are not in a contractual relationship with the hoster(s) in the U.S., the content indicated is protected by the U.S. First Amendment, and the blocking is an inadequate and disproportionate measure.

Whether blocking content is technically possible is subject to continued debate between industry and government. In particular, cross-border issues created by illegal or harmful content that governments or local authorities would seek to block should be resolved through bilateral or global government consultations. ISPs believe that there are detailed technical reasons why an effective blocking mechanism does not yet exist. Instead of blocking sites, content providers and end users should self regulate and should take advantage of PC-based filtering technologies, which would be more efficient. Internet providers are not responsible for the content and therefore are the wrong addressee for any legal action.

**Conclusion:** CompTel/ASCENT reiterates its concern about the lack of decisive improvements in the German markets. CompTel/ASCENT urgently requests that USTR strive for changes to the current Draft Law to ensure that independent regulation can finally be implemented in Germany, and to remove the “functional competition” and “double dominance” tests that were explicitly designed to prevent regulation of mobile termination, in violation of the *Reference Paper* and the GATS *Telecommunications Annex*.

**INDIA**

CompTel/ASCENT has been encouraged to see that India accelerated the opening of its international long-distance market in 2002, two years ahead of the WTO commitment of 2004. As described below, however, significant barriers to competition continue to exist that violate India’s WTO commitments.

**WTO CONCERNS – *GATS Commitments, Reference Paper and GATS Telecommunications Annex***

**Access to Submarine Cable Capacity:** The Indian Government is violating its commitments in the WTO Basic Telecommunications Agreement and the GATS *Telecommunications Annex* by not ensuring reasonable and non-discriminatory interconnection and access to VSNL’s submarine cable station. Although there is much unused submarine cable capacity in several of the cable systems landing in India, VSNL has severely limited access to that capacity as the owner of the submarine cable station at which those cables land. Specifically, VSNL refuses to allow interconnection or access to the capacity at its cable station at reasonable rates, and discriminates in favor of itself on the rates, terms, and conditions offered to access the limited amount of capacity that it does make available.

VSNL’s actions have created an artificial shortage of submarine cable capacity, which prevents competitive operators from meeting the full bandwidth demands of their customers and keeps bandwidth prices for the capacity that is available at much higher levels than the prices for the similar capacity on routes where the market is more competitive. For example, the cost of a 45 Mb/155 Mb link from India to the United States is nearly 2 or 3 times more expensive than the cost of an equal circuit from Singapore to the United States and 8 to 10 times more expensive than for a link between China and the United States. Such pricing disparities lead to higher prices for the customers of U.S. operators, which have forced those customers to consider offshore locations other than India for their IT-related activities.

VSNL's restrictions on access to submarine cable capacity are clearly inconsistent with India's international trade commitments. For example, in its Schedule of Specific Commitments in the WTO Basic Telecommunications Agreement (Fourth Protocol to the General Agreement on Trade in Services (GATS)), India committed to ensure interconnection with a major supplier in India, upon request by other operators, of a quality no less favorable than that offered to the major supplier's affiliates, and to make its interconnection agreements publicly available. VSNL, as a major supplier, is therefore obligated to offer interconnection at the cable station on a basis that is no less favorable than that offered to itself or its affiliates, and to make such agreements (or a "reference interconnection agreement") publicly available. India, however, has not required VSNL to issue a public interconnection offer for interconnection to competitors' cable capacity at its cable station. Not only does VSNL not offer such interconnection on a non-discriminatory basis, but for large amounts of available capacity VSNL offers no access at all, even though such capacity is readily available on submarine cables landing in India.

Moreover, pursuant to Section 5(a) of the GATS *Telecommunications Annex*, India is obligated to ensure that VSNL accords access to and use of its public telecommunications network and services on reasonable and non-discriminatory terms and conditions. Access to submarine cable capacity, which is a fundamental element of the public telecommunications network in India, therefore must be made available to other suppliers on a reasonable and non-discriminatory basis.

**Competitive Safeguards:** India must implement measures that will prevent major suppliers from engaging in anti-competitive practices, as committed to in Section 1 of the *Reference Paper*. Bharat Sanchar Nigam Ltd ("BSNL") has market power in domestic long distance, fixed line services and mobile serves. Currently, sufficient rules are not in place to require structural and accounting separation of BSNL's multiple lines of business, nor are there safeguards in place to prevent anti-competitive pricing practices.

**Barriers to Market Access:** By opening its market to foreign investors in international and domestic telecommunications services, India committed to national treatment for U.S. operators. India is not complying with these commitments by imposing significant barriers on foreign-owned license applicants. The exorbitant licensing fee, the build-out obligations, and other financial conditions applicable to international long distance operators constitute serious barriers for new market entrants. The current licensing fee is approximately $5.21 million. In addition, licensees will be required to post a performance bond of equal value ($5.21 million) and to pay an annual fee of 15% of net revenues. Moreover, new entrants will be required to install an international gateway switch and establish a minimum of four regional points of presence ("POPs") within India. Switchless service resale will not be permitted for a minimum of three years after the international services market opened on April 1, 2002.

**Interconnection Usage Charge/Access Deficit Charge:** In January 2003 the TRAI, India's telecommunications regulator, implemented an Access Deficit Charge ("ADC") in connection with its Telecommunications Interconnection Usage Charge (IUC) Regulation, 2003. Many industry participants raised serious concerns with the proposed ADC (and, in particular, the high ADC applied to international long distance traffic). In response, the TRAI re-opened the IUC Consultation in May 2003, and in October issued a revised Regulation. The new regulation offers some limited structural improvements on the ADC component, but still relies on an imprecise calculation of the access deficit to be recovered and continues to place a heavy recovery burden on international service providers and their customers. Accordingly, the regime remains inconsistent with India's WTO Commitment.

The Indian Government committed to implement a Universal Service regime that it would administer in a transparent and non-discriminatory manner.[7] However, the higher ADC charge on international traffic is inherently discriminatory against international operators, because international calls impose the same costs on the local network as do domestic calls, yet the international operators must pay a higher rate than domestic operators, and one that is clearly above-cost. Further, to ensure transparency of any universal service subsidy, the TRAI is obligated to pursue a much more rigorous analysis when calculating any claimed access deficit: first, to ensure that the incumbent has incentives to operate efficiently; and, second to ensure that any ADC receipts are used solely to subsidize legitimate services and for no anticompetitive or unjust purpose. TRAI must do more to ensure a rigorously transparent analysis of the claimed access deficit.

Pressure should remain on the TRAI to eliminate the ADC and to encourage implementation of a transparent and non-discriminatory universal service policy. This will enhance competition in India and improve trade between the US and India.

## JAPAN

### WTO VIOLATIONS - *Reference Paper, GATS Telecommunications Annex and May 1998 U.S.-Japan Deregulation Joint Statement*

As CompTel/ASCENT stated in our 2003 Comments, Japan has made significant strides in market liberalization and development since the *May 1998 U.S.-Japan Deregulation Joint Statement*, and the entry into force of its WTO Commitments. While problems remain with respect to effective regulation of Nippon Telegraph and Telephone Corporation ("NTT") as a dominant carrier, unnecessarily burdensome regulation of non-dominant carriers, and the need for stronger independent regulation in Japan, CompTel/ASCENT is pleased that in 2003 Japan adopted a new Telecom Business Law that appears to take positive steps to address these issues. The implementation of the Law, however, will determine whether these issues are in fact being addressed effectively. Drafts of the ordinances (regulations) implementing the law were issued in December, and public comments on those drafts are due on January 15, 2004. We are pleased

[7] World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services, *India – Schedule of Specific Commitments Supplement 3, Reference Paper* at para. 3. (April 11, 1997).

that the draft ordinances will result in the designation of NTT/East and NTT/West PSTN interconnection and local leased circuit services as regulated, but remain concerned that tariffs for those services are far above cost.

Tariffs for NTT/East and NTT/West local leased circuits are unreasonable, in violation of Japan's commitments under the Section 5 of the GATS *Telecommunications Annex*. Indeed, a study by the consultant Teligen that was commissioned by competitive operators in Asian demonstrates that local leased line rates in Japan are significantly higher than in all other Asian countries and most other developed countries.[8] USTR should monitor the implementation of the Telecom Law to ensure that it addresses the outstanding competitive concerns discussed above, and should ensure that MPHPT initiates an investigation to verify the cost basis for the local leased line tariffs NTT/East and NTT/West. Moreover, CompTel/ASCENT's concern raised in its 2003 Comments regarding above-cost interconnection rates in Japan has in fact gotten worse, given that MPHPT actually *increased* interconnection rates in 2003.

**MEXICO**

The $14 billion telecommunications market in Mexico has significant potential for growth, but is being harmed by the many barriers remaining to telecommunication competition in Mexico. Mexico acknowledged the importance of open markets by making World Trade Organization ("WTO") commitments, which, if fully implemented, would allow effective competition to flourish. Although these commitments became effective in 1998, Mexico has not implemented them and continues to maintain barriers to competition. These barriers both affect U.S. interests and deprive Mexican citizens of the benefits of competition. Competition in Mexico will provide benefits to customers and carriers in both countries with lower prices and through the introduction of new and innovative services.

CompTel/ASCENT is pleased to note that recent reports indicate a WTO panel has found that Mexico has not implemented its cross-border telecommunications trade commitments. This will hopefully spur Mexico to meet these cross-border commitments and remove numerous other domestic barriers to competition that continue to exist in Mexico.

**WTO VIOLATIONS – *Reference Paper***

**Interconnection:** Mexico has failed to ensure the availability of cost-oriented interconnection arrangements with Telmex, its major supplier, as required by Section 2.2 of the Reference Paper.

***On-Net Interconnection:*** For interconnection of domestic long distance calls to Telmex's network in a city where a new competitive carrier has a network, Cofetel allows Telmex to charge competitive carriers 0.975 cents per minute for 2003 interconnection, without cost-justification. In addition, long distance carriers must pay a call attempts surcharge (2.85%

[8] See *Local Access Circuit Price Benchmarking for Key Asia-Pacific Countries vs. Each Other, the European Union & OECD Countries*, A Report Produced by Teligen for a Group of Global Operators Providing Competitive Service in Asia – Pacific Region, November 2003 (available upon request).

of the interconnection charge) and 0.53 cents per interconnection minute for special projects, resulting in a net payment of 1.53 cents per minute. Similar long-distance interconnection in competitive countries is routinely available for about one cent per minute.

***Off-Net Interconnection:*** For interconnection of long distance calls to Telmex's network for cities that Telmex has refused to open to competition or that are otherwise not subject to equal access interconnection arrangements, or for cities where a new competitive carrier does not have a network, Telmex charges that competitive carrier a "resale" tariff rate. The resale rate is currently about 7.5 cents per minute, almost four times the level of a cost justified rate. The resale rate is based, without cost-justification, on a 25% discount from Telmex's commercial rates to customers. Similar regional interconnection is routinely available in competitive countries for 2 to 3 cents per minute.

***Local Interconnection:*** Mexico has failed to ensure timely, non-discriminatory, cost-based interconnection for local competitors. Although Telmex has recently provided interconnection to several carriers, Telmex has imposed several restraints to prevent full and fair competition. For example, local number portability is not provided, despite the requirements of Mexican law. In addition, Telmex has imposed a discriminatory "bill and keep" system that excludes data traffic that benefits only Telmex. The lack of interconnection quality standards results in routing and programming failures for competitors' local service traffic.

**Anti-Competitive Practices:** Mexico has failed to maintain appropriate measures to prevent anti-competitive practices by Telmex, as required by Mexico's commitments under Section 1 of the Reference Paper. Mexico has failed to set competitive safeguards and Cofetel has failed to enact dominant carrier regulation, even though it has the ability to do so. Enforcement of dominant carrier safeguards is long overdue in Mexico. Telmex has denied competitors phone lines needed to provide service, priced its own services at predatory rates, refused to allow other carriers to interconnect to its network, and has withheld fees it owes competitors. Furthermore, Mexico allows Telmex to offer DSL services while excluding its competitors by refusing to unbundle the local loop, even for bit stream access.

Similarly, Mexico has not enforced its regulations requiring Telmex to offer a billing and collection service to its competitors under non-discriminatory terms and conditions. Telmex has refused either to provide such requested services or to disclose the terms and conditions under which it provides such services to its affiliates. Cofetel has not responded to numerous complaints filed as early as 1997.

**Prohibition on Foreign Control:** Mexico should eliminate its prohibition on foreign control of Mexican "concessionaires" (facilities-based carriers), which also is contrary to Mexico's WTO obligations.

**PERU**

**WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex***

**Excessive Fixed-to-Mobile Termination Rates:** In the 2003 Section 1377 Report, USTR indicated that "in Peru, the regulator is reportedly seeking cost information from operators in connection with" the mobile termination issue. Apparently such action has had no effect in Peru as Peru's major suppliers for mobile termination have recently attempted to unilaterally increase the cross-border interconnection rates that they are paid by U.S. international carriers for terminating calls on mobile networks in Peru by as much a 40 percent. Peru has a commitment, pursuant to Section 2.2 of the WTO *Reference Paper*, to ensure that its major suppliers offer cross-border interconnection that is non-discriminatory, cost-oriented, transparent and reasonable, and, under Section 5 of the GATS *Telecommunications Annex*, to ensure access to and use of the public telecommunications network on reasonable and non-discriminatory terms and conditions. CompTel/ASCENT submits that the cross-border interconnection rates for mobile networks being demanded by major suppliers in Peru are neither cost-oriented nor reasonable. The carriers in Peru have offered no cost-justification for the existing cross-border mobile interconnection rates or for the proposed increases. USTR, therefore, should strongly urge Peru to fully comply with its WTO commitments with respect to cross-border interconnection.

**SINGAPORE**

**WTO – *GATS Telecommunications Annex***
**UNITED STATES – SINGAPORE FREE TRADE AGREEMENT**

There have been two positive developments with respect to Singapore since USTR issued its 2003 Section 1377 Report. First, the U.S. and Singapore Governments completed and ratified the U.S.-Singapore Free Trade Agreement ("FTA"), which includes important market access commitments and pro-competitive regulatory principles, including the principle of ensuring that new entrants have access to and use of any public telecommunications network or service, including leased circuits, on reasonable, transparent, and non-discriminatory terms and conditions. CompTel/ASCENT applauds USTR and the Singaporean Government for concluding the FTA.

Second, on December 16, 2003, Singapore's NRA, the Infocomm Development Authority of Singapore ("IDA"), issued a decision designating SingTel's local leased circuits as a mandated wholesale service subject to cost-oriented price regulation in Singapore.[9] CompTel/ASCENT commends the IDA for its decision, which addresses the concerns raised in our 2003 Section 1377 Comments that high leased circuit prices of SingTel were inconsistent

[9] See, Explanatory Memorandum Issued by Info-Communications Development Authority of Singapore, *Designation of Singapore Telecommunications Limited's Local Leased Circuits as a Mandated Wholesale Service*, 16 December 2003.

with the GATS *Telecommunications Annex*.[10] We are very concerned, however, that on December 31, 2003, the IDA issued a stay of its decision in response to SingTel's appeal. IDA issued the stay without any providing any reasoning for the decision and without first providing an opportunity by interested parties to comment on SingTel's request for a stay. CompTel/ASCENT notes that Article 9.11 of the U.S.-Singapore FTA states that reconsideration of a decision by a regulator is not a ground for delaying implementation of that regulatory decision unless an appropriate authority determines that a stay of the decision is warranted. CompTel/ASCENT is concerned that the decision, which was close to two years in the making, not be further delayed. We urge USTR to monitor the situation closely to ensure that the IDA's decision is implemented expeditiously and in a manner consistent with Singapore's obligations under the FTA.

**SOUTH AFRICA**

In the 2003 Section 1377 Report, USTR correctly concluded that "inadequate regulatory oversight appear[s] to be hindering new investment in South Africa's telecommunications sector." USTR also indicated that ongoing FTA negotiations might provide an opportunity to address these concerns. Unfortunately, as discussed below, there has been virtually no improvement in the regulatory situation in South Africa over the past year. Given South Africa's apparent refusal to live up to its WTO commitments and to address the overwhelming dominance of Telkom South Africa (despite several years of complaints by USTR and competitive operators), USTR should insist in its FTA negotiations with South Africa that South Africa make full market access commitments for *all* telecommunications services and commit to the full array of regulatory principles contained in the Telecom Chapters of the Singapore and Chile Free Trade Agreements. Only such binding commitments will ensure the implementation of a viable environment for the development of the telecommunications sector in South Africa.

**WTO VIOLATIONS – *GATS Value-Added Commitments and Telecommunications Annex***

**Second National Operator Licensing Delay:** The South African Government had planned to license a competitive operator by 2003 to compete with Telkom. Delay in licensing the second national operator ("SNO") has resulted in one more year of monopolistic and anti-competitive practices by Telkom. Such delay has a direct impact on the prices and services offered by Telkom to providers of valued added network services ("VANS"). Telkom has even decreased its prices to VANS providers in expectation of the SNO being licensed, only to increase those prices again when the Government announced further delay. This violates South Africa's commitment pursuant to the GATS Basic Telecommunications Agreement to have a duopoly in place for basic telecommunications services no later than December 31, 2003.

**Amendment to the Telecommunications Act of 1996 (Amendment Bill):** In November 2002, President Thabo Mbeki signed into law the Telecommunications Amendment Bill, 2001 ("Amendment Bill"), which amends the SA Telecommunications Act of 1996 ("Act")

[10] Articles 9.2 and 9.4.9 of the FTA also require reasonable and non-discriminatory terms and conditions for local leased circuits.

and introduces the concept of a SNO. The original intent of the Bill was to create the legal framework for the next stage of competition and to encourage foreign investment in South Africa. Instead, the Bill significantly reduces the current rights of competitive VANS operators and increases the power and control of the government-owned monopoly incumbent public telephony operator, Telkom. Additionally, the Amendment Bill reduces the powers of the independent regulator, Independent Communications Authority of South Africa ("ICASA"), in favor of the Ministry of Communications – the government entity responsible for the government's 70% equity ownership interest in Telkom.

**Lack of Resale in South Africa:** Section 32A of the Amendment Bill states that resale of basic telecommunications services will not be authorized until 2005 at the earliest. This effectively establishes exclusivity for the partially government-owned second public switched telephone network operator - if an SNO is ever licensed - to resell Telkom's facilities until 2005 at the earliest. Such a restriction clearly violates an explicit commitment by South Africa, in its schedule of basic telecommunications commitments (GATS/SC/78/suppl.2, April 1997), to permit resale by 2003. Lack of a resale alternative for VANS prolongs the current high costs for both leased lines and international bandwidth incurred by VANS competitors in South Africa.

**Lack of Independent Regulator:** Several provisions in the Amendment Bill compromise the independence of the regulator and the likelihood of it making impartial decisions by: (1) transferring regulatory functions from ICASA to the Ministry of Communications; and (2) reversing prior ICASA rulings. Under Sections 35 and 35A, the Ministry of Communications replaces the impartial regulator, ICASA, as the entity responsible for all licensing decisions. Section 65(4) transfers administration of the Universal Service Fund from ICASA to the Ministry. Under Section 43(10), the Bill limits the mandate for interconnection agreements to 5 years by authorizing a single party to the agreement to trigger a renegotiation of some or all of the terms of the agreement – such a provision ignores the interconnection guidelines adopted by the regulator in 2000. Overall, Sections 43 and 44 of the Amendment Bill override the Interconnection Regulations that were approved previously by the South African Telecommunications Regulatory Authority ("SATRA") (the regulatory agency that preceded ICASA). In practice, Telkom "self-regulates" without interference by the regulator, making its own unilateral determinations as to which services qualify as VANS, and refusing interconnection or leased lines to those VANS operators who Telkom decides are not providing VANS.

This transfer of key regulatory functions from ICASA to the Ministry seriously damages the existence of an independent and impartial regulator, in violation of South Africa's *Reference Paper* commitments to establish a regulator that is separate from and not accountable to Telkom.

**Potential Re-monopolization of CPE in South Africa:** Section 36A(1)(h) of the Amendment Bill expands the definition of Public Switched Telecommunication Service ("PSTS") to include "the provision, repair and maintenance of equipment located on a customer's premises ("CPE") and any other telecommunications apparatus of any kind." Although VANS suppliers have received assurances that this language does not give Telkom and the Second National Operator exclusive rights to provide CPE, there is a danger that this language could lead to the re-monopolization of CPE, in violation of South Africa's commitment to ensure access to and use of terminal or other equipment that attaches to the public telecommunications transport network under section 5(b)(i) of the GATS *Telecommunications Annex*. South Africa must ensure that this provision of the Amendment Bill is not used to impede VANS suppliers in South Africa from providing equipment and services that are necessary to the provision of their services.

**VANS Ownership Restriction:** On October 1, 2003, the Department of Communications issued regulations requiring a minimum 15 percent shareholdings in deemed VANS operators with annual turnover of one million Rand and above by "historically disadvantaged individuals" by October 1, 2005. This constitutes a limitation on the participation of foreign capital, in violation of GATS Article 16(2)(f). South Africa's WTO commitments on VANS allow no restrictions on foreign ownership for VANS.

## SWITZERLAND

### WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex*

As Switzerland is not an EC member, EC directives and regulations are not binding for Switzerland. However, EC directives are often used as guidelines to amend and revise Swiss law.

**Local Access Leased Lines – Pricing:** Despite the requirements of Section 2.2(b) of the *Reference Paper* for cost-oriented rates, the rates charged in Switzerland for local access leased lines are extraordinarily high. In October 2000, the Federal Communications Commission ("ComCom") ordered Swisscom to provide local access leased lines at LRIC-based rates, and on a non-discriminatory basis. Swisscom appealed this decision, and the Federal Court ruled one year later (October 2001) that the NRA did not have competence to take such a decision. Because of this decision by the Federal Court, ComCom has seen an urgent need for legislative action on the high prices of leased lines. The end result is that Switzerland is failing to comply with its WTO obligations. This motivated the Federal Council to amend the Telecommunications Decree, as the legal base in the current law was not disputed.

Since April 1, 2003, the amended Telecommunications Decree defines leased lines as an interconnect service, requiring cost oriented prices. Despite this clear legal obligation, Swisscom has rejected requests from other operators for interconnecting leased lines. Hence, operators are requested to open an interconnect dispute, which will be subject to long proceeding times and a likely appeal against the decision by Swisscom. It is therefore likely that access to cost based leased lines by other operators could be denied for years to come. The end result is that Switzerland is still failing to comply with its WTO obligations to ensure cost-oriented interconnection services and access to and use of the public telecommunications network on reasonable and non-discriminatory terms and conditions.

**Unbundled Local Loop:** Under Section 2.2(b) of Switzerland's Schedule of Specific Commitments (GATS/SC/83/Suppl.3/Rev.1 (28 Jan 98)), interconnection is to be ensured "in a timely fashion...and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided...."

Little has changed with respect to unbundling and broadband in the Swiss market over the past year. Despite the best efforts of the NRA, which issued an injunction in November 2000 and ordered the incumbent to immediately implement bit stream access and draft a full unbundling Reference Interconnection Offer ("RIO"), the Federal Court overruled this injunction in March 2001. Although the Swiss NRA has continued to energetically promote unbundling as a key step towards greater competition and towards strengthening Switzerland's position as a business location, the NRA decided in another case in February 2002 against an unbundling obligation by accepting the Federal Court's position regarding leased lines, claiming that the NRA does not have the authority to take this decision.[11] The NRA continues to push for rapid implementation of unbundling via changes to decrees. This is in contrast to Swisscom's arguments that unbundling and leased lines regulations can only be introduced by changes to the Law – a process that can be expected to take many years.

Emerging carriers believe that these decisions reflect bias on the part of the Government towards Swisscom, which is, even after a buyback of 10% of its shares, still 62.7% government-owned. Although the decisions relied on Article 11 of the Swiss Telecommunications Act ("Telecoms Act"), which requires dominant operators to provide interconnection to other operators without discrimination and in accordance with the principles of a transparent and cost-related price policy, it appears that the Federal Court continuously chooses to interpret the Telecoms Act in the incumbent's favor. In December 2000, the Swiss parliament rejected a motion by one of its members to introduce in the Swiss Telecommunications Act an explicit obligation on the incumbent, Swisscom, to unbundle the local loop.

Given the fact that the Swiss parliament already has rejected a motion for such an amendment in December 2000, and the ongoing review of the Swiss telecommunications law and ordinances and decisions that must be made in that context, CompTel/ASCENT submits that Switzerland is in clear violation of its WTO commitments to ensure that it mandates cost oriented leased line prices and local loop unbundling through a change of the Telecommunications Decree.

**Ex-ante regulation:** According to the law in force, in the case of market dominance in specific markets, the NRA can only take action as the result of a request from a telecommunications services provider within the framework of a formal interconnection procedure (*ex-post* regulation). This procedure has proven to be unwieldy and protracted, enables the incumbent to introduce delays, and does not encourage competition to a sufficient extent. For example, most interconnection disputes run for several years. One of the goals of the currently pending amendment of the Swiss Telecoms Act is to provide the NRA with firmer regulatory instruments and bring the Telecoms Law into line with that of the EU. Indeed, the first draft of the amended law contained *ex ante* regulation consistent with EU law intended to address these issues. The draft version of the law published in November 2003 after

[11] See press release: http://www.fedcomcom.ch/comcom/e/communiques/2002/198.html.

parliamentary input, however, completely removes the potential for *ex ante* regulation.[12] If *ex-ante* regulation is introduced, the NRA should examine the relevant markets to see whether competition is effective, and request and approve Reference Interconnection Offers ("RIOs") from dominant operators. By omitting *ex ante* regulation mechanisms, and by failing to meet time limits for interconnection disputes, market dominant operators will still be able to gain substantial benefits from drawn-out proceedings on the cost of competition. To that end, CompTel/ASCENT urges USTR to ensure that the Swiss Government enacts regulatory measures in its legislation that enables Switzerland to comply with its Reference Paper commitments to ensure transparency of interconnection arrangements and resolve interconnection disputes within a reasonable period of time.

**Excessive Fixed-to-Mobile Termination Rates:** Fixed-to-mobile termination rates in Switzerland are far from cost-oriented, in violation of Section 2.2(b) and Section 1 of the *Reference Paper*, and in violation of Section 5(a) the GATS *Telecommunications Annex*. In particular, Swisscom's mobile affiliate, the largest mobile network operator in Switzerland, charges fixed operators approximately 23 Eurocents - four to five times the LRIC rate - to terminate calls on its mobile network. The absolute level of the termination rates is among the highest in Europe. Additionally, mobile operators in Switzerland discriminate against fixed network operators by charging their own customers far less for "on-net" mobile-to-mobile termination than they charge fixed network operators for fixed-to-mobile termination. The per minute fixed-to-mobile rate in Switzerland varies from 23 to 25 Eurocents, whereas the mobile-to-mobile rate in the context of closed user group offers ranges from about 5 to 15 Eurocents. The only conclusion that can be reached is that mobile operators are discriminating in favor of themselves vis-à-vis fixed operators.

In sum, the current situation causes serious harm to U.S. companies seeking to compete in the Swiss market and to U.S. consumers who are forced to pay too much for calls to mobile users in Switzerland. CompTel/ASCENT believes that Switzerland should live up to its telecommunications trade commitments by taking appropriate actions with respect to the current fixed-to-mobile rates to bring Switzerland more in line with its neighbors. Moreover, the discrimination against fixed network operators results in significant financial harm to U.S. network operators and customers and violates Switzerland's WTO commitment to ensure reasonable and non-discriminatory access to and use of the public mobile network in Switzerland.

## CONCLUSION

For the reasons described above, CompTel/ASCENT urges the U.S. Government to work aggressively with the Governments of Austria, Australia, China, France, Germany, India, Japan, Mexico, Peru, Singapore, South Africa, and Switzerland to open their markets for competition and to ensure fair and non-discriminatory market conditions in accordance with their respective international trade commitments.

[12] See draft law at http://www.bakom.ch/en/medieninfo/medienmitteilungen/uvek/artikel/01157/index.html.

Sincerely,

Carol Ann Bischoff

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